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Awangku Dewa bin Pgn Momin & Ors v Superintendent of Lands and Surveys, Limbang Division

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COURT OF APPEAL (KUCHING) — CIVIL APPEAL NO Q-01(NCVC)(A)-253–07 OF 2014
MOHD HISHAMUDIN, DAVID WONG AND TENGKU MAIMUN JJCA
C 11 FEBRUARY 2015

Land Law — Customary land — Native customary rights — Claim for compensation — Land owner ceded rights over — Whether descendants still had rights land law — Whether descendants still had rights land law — Native customary rights to claim for compensation when Government of Sarawak acquired land — Matter referred to arbitration — Arbitration dismissed claim — Appeal against decision of arbitration — Whether proceedings were appeal against arbitration decision

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E

The appellants claimed to be the descendants of the Brunei Royal family, in particular, the descendants of one Dato' Pengiran Hj Matusin ('the deceased'). The deceased was said to have had acquired native customary rights ('NCR') over several parcels of land in Kuala Lawas, Sarawak. Hence, the appellants
F further claimed that they were entitled to compensation when the Government of Sarawak acquired the land for public purposes. The Government of Sarawak, via the respondent contended that the appellants were not entitled to compensation because their NCR over the parcels of land ceased when the deceased ceded his rights over them to the Rajah of Sarawak through the Deed
G of 1905 in return for yearly payments of $6,000 per year. In arbitrating the matter, the arbitrator disallowed the appellants' claims for compensation. The appellant referred eight questions of law pursuant to s 42 of the Arbitration Act 2005 ('the Act') to the High Court but the application was dismissed and the award of the arbitrator was confirmed. Hence, the present appeal.

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Held, dismissing the appeal with costs of RM10,000:

(1) A High Court must ensure that the questions referred by the applicant were purely a question of law and not a question of mixed law and fact.
I The questions must be clearly and concisely framed, before embarking to entertain the application and to answer the question posed. A High Court must summarily dismiss the application under a s 42 reference without even attempting to answer the question of law posed to the court if the question was in the first place, not properly and intelligibly framed

or where it was clear to the court that there was a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal (see paras 27–28).

(2) The reference was an attempt to appeal against the award but disguised as 'reference on questions of law' under s 42 of the Act. If it had been a genuine move to refer questions of law to the High Court, then the questions of law would have been concisely and clearly framed and the questions posed needed not have to be as many as eight (see para 22).

[Bahasa Malaysia summary

Perayu-perayu mendakwa adalah keturunan keluarga diRaja Brunei, terutamanya, keturunan daripada orang yang bernama Dato' Pengiran Hj Matusin ('si mati'). Si mati dikatakan telah memperolehi hak adat anak negeri ('NCR') ke atas beberapa bidang tanah di Kuala Lawas, Sarawak. Maka, perayu-perayu selanjutnya mendakwa bahawa mereka berhak kepada pampasan apabila Kerajaan Sarawak mengambil alih tanah bagi tujuan awam. Kerajaan Sarawak, melalui responden berhujah bahawa perayu-perayu tidak berhak kepada pampasan kerana NCR mereka ke atas bidang tanah tersebut tamat apabila si mati menyerahkan haknya ke atas tanah tersebut kepada Rajah Sarawak melalui Surat Ikatan 1905 sebagai balasan untuk bayaran tahunan sebanyak $6,000 setahun. Dalam menimbang tara perkara tersebut, penimbang tara tidak membenarkan tuntutan perayu-perayu untuk pampasan. Perayu merujuk lapan soalan undang-undang berikutan s 42 Akta Timbang Tara 2005 ('Akta') kepada Mahkamah Tinggi tetapi permohonan ditolak dan award penimbang tara disahkan. Maka, rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Mahkamah Tinggi mesti memastikan bahawa soalan-soalan yang dirujuk oleh pemohon adalah semata-mata soalan undang-undang dan bukan soalan bercampur undang-undang dan fakta. Soalan mesti secara jelas dan tepat dirangka, sebelum memulakan untuk mempertimbangkan permohonan dan untuk menjawab soalan yang ditujukan. Mahkamah Tinggi mesti secara ringkas menolak permohonan di bawah rujukan s 42 tanpa mencuba untuk menjawab soalan undang-undang yang ditujukan kepada mahkamah jika soalan tersebut pada mulanya, tidak dirangka dengan betul dan difahami atau di mana ia adalah jelas kepada mahkamah bahawa terdapat percubaan terselindung oleh pemohon untuk merayu terhadap keputusan tribunal timbang tara (lihat perenggan 27–28).

(2) Rujukan adalah percubaan untuk merayu terhadap award tetapi terselindung sebagai 'reference on questions of law' di bawah s 42 Akta. Jika ia adalah percubaan betul untuk merujuk soalan undang-undang kepada Mahkamah Tinggi, dengan itu soalan undang-undang akan

dirangka secara jelas dan tepat dan soalan-soalan yang ditujukan tidak perlu menjadi terlalu banyak seperti lapan (lihat perenggan 22).]

Cases referred to

Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)

SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd [2014] 2 MLJ 627; [2014] 3 CLJ 632, CA (refd)

Legislation referred to

Arbitration Act 2005 ss 36, 37, 42, 42(1), 42(4)(a)

Appeal from: Originating Summons No LMN-24NCVC-1/9 of 2013 (High Court, Limbang)

Baru Bian (Simon Siah Sy Jen and Chua Kuan Ching with him) (Baru Bian) for the appellants.

Marjanah bt Adenan (State Counsel, State Attorney-General's Chambers) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Limbang of 2 March 2014 (the decision delivered at the High Court at Miri).

[2] We heard the appeal on 17 October 2014 and we informed parties that our decision will be delivered on 11 February 2015.

[3] Today, we deliver our decision.

[4] In its decision, the High Court had, pursuant to s 42(4)(a) of the Arbitration Act 2005 ('the Act'), confirmed the award of the arbitrator, and dismissed the appellants' application to set aside the same.

[5] The confirmation of the award was made following a reference to the court by the appellants on 'questions of law' pursuant to s 42(1) of the Act.

[6] For the purpose of convenience, we reproduce the following relevant provisions of s 42 of the Act:

Reference on questions of law

42(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award —

(a) does not contain the arbitral tribunal's reasons;

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference —

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

THE BACKGROUNDS FACTS

[7] As for the background facts, the appellants claim that they are the descendants of the Royal Brunei family, in particular, the descendants of one Dato' Pengiran Hj Matusin who had acquired native customary rights ('NCR') over several parcels of land in Kuala Lawas, Lawas, Sarawak before the era of the Rajah Brooke. They claim that they are entitled to compensation when the Government of Sarawak 'acquired' the land for public purposes. The Government of Sarawak via the Superintendent of Lands and Surveys, Limbang Division, took the position that the appellants are not entitled to compensation as they had ceased to have NCR over the parcels of land when, by the Deed of 1905, Dato' Pengiran Hj Matusin had ceded his rights over the parcels of the land to the Rajah of Sarawak in return for yearly payments of 6,000 dollars per year perpetually.

[8] For the rest of the material facts, we find it convenient and adequate to just refer to the 'Brief Summary of Dispute Referred to Arbitration' prepared by the respondent in this appeal (Superintendent of Lands and Surveys, Limbang Division), Sarawak and exhibited by the appellants in their affidavit in support (see exh AD3) of their originating summons. This brief summary states as follows:

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BRIEF SUMMARY OF DISPUTE

REFERRED TO ARBITRATION

1. INTRODUCTION

1.1 Applications have been made by Awangku Dewa bin Pgn. Momin (WN.KP. 470330-13-5001), Awgku Said bin Pgn. Matsalleh (WN.KP.361216-13- 5291), Awangku Ibrahim bin Pgn. Mumin (WN.KP.420106-13-5239) and Awangku Matersad bin Pgn. Matsalleh (WN.KP.481216-13-5343) all of Kuala Lawas, Lawas to the Superintendent of Lands and Surveys, Limbang Division, Limbang ('the Superintendent') under section 212 of the Land Code (Cap. 81) ('the Land Code') to refer to Arbitration the rejection by the Superintendent of the claims to native customary rights over 3 parcels of state Land known as Lots 783, 1044 and 1076 all in Block 1 Merapok Land District (being parts of Lots 552, 405 and 555 all in Block 1 Merapok Land District respectively).

2. SUMMARY

2.1 Pursuant to section 212 of the Land Code, I, as Superintendent of Lands and Surveys hereby submit a brief summary of the Dispute now referred to Arbitration under section 212(1) of the Land Code.

2.2 The subject land described as Lots 783, 1044 and 1076 all of Block 1 Merapok Land District (being parts of Lots 552, 405 and 555 Block 1 Merapok Land District respectively) are situated at Kpg. Pemukat, Kpg. Dato and Panglung, Kuala Lawas, Lawas and having an area of 3.6990 hectares, more or less, 2.338 hectares, more or less, and 2210 square metres respectively. A plan showing these parcels of land is attached herewith marked Appendix 'A'.

2.3 The claimants of the said lands are the applicants, Awangku Dewa bin Pgn. Momin (WN.KP.470330-13-5001), Awgku Said bin Pgn. Matsalleh (WN.KP.361216-13-5291), Awangku Ibrahim bin Pgn. Mumin (WN.KP.420106-13-5239) and Awangku Matersad bin Pgn. Matsalleh (WN.KP.420106-13-5343) all of Kuala Lawas, Lawas and each claiming one-fourth (1/4th) share in those 3 parcels of State Land.

2.4 Notice under the LAND (EXTINGUISHMENT OF NATIVE CUSTOMARY RIGHTS) (KUALA LAWAS AREA) (NO. 55) DIRECTION, 1997 ('the Direction') together with the locality plan made under section 5(3) and (4) of the Land Code (Appendix 'B') was approved by the Permanent Secretary, Ministry of Resource Planning on 26th day of August, 1997.

2.5 The said Direction was published in the Sarawak Government Gazette on the 25th day of September, 1997 vide Gazette Notification No. 2714. It was also posted on the Notice Boards of Lands and Surveys Office, Limbang and District Office, Lawas both on 15th September, 1997.

2.6 Pursuant to the said Direction, all Native Customary Rights within the area described in the said direction were extinguished on 9th day of September, 1997.

2.7 Following the Direction, the said claimants, Awangku Dewa bin Pgn. Momin, Awgku Said bin Pgn. Matsalleh, Awangku Ibrahim bin Pgn. Mumin and Awangku Matersad bin Pgn. Matsalleh submitted their claims for compensation for the extinguishment of Native Customary Rights over the said 3 parcels of State Land to the Superintendent on prescribed Form 'E'.

2.8 The Superintendent after due investigation, rejected their claims as the lands are State Land and the claimants had failed to discharge the onus imposed on them by section 5(6) of the Land Code to establish that the said lands or any of them are encumbered by rights of the nature claimed by the claimants. All the claimants were given letters of rejection of the claim to Native Customary Rights.

2.9 The said claimants of the 3 parcels of State Land were dissatisfied with the decision of the Superintendent, and they have requested the Superintendent to refer the matter to arbitration in accordance with the provision of section 212 of the Land Code vide their join letter dated 20th day of August, 1998.

3. OFFER MADE BY THE GOVERNMENT

3.1 As the claimants failed to prove that the 3 parcels of State Land were encumbered with Native Customary Rights or that they (the claimants) have acquired any such rights thereto in accordance with section 5(1) and/or section 5(2) of the Land Code, no offer of compensation was made to them or any of them.

THE AWARD OF THE ARBITRATOR

[9] The arbitrator made an award in favour of the respondent (Superintendent of Lands and Surveys, Limbang Division) and disallowed the appellants' claims for compensations in respect of certain parcels of state land which the appellants are claiming as being the owner; holding that by the Deed of 1905 the appellants had ceded the parcels of land in question to the then Government of Sarawak, the Rajah of Sarawak; and with the cessation they ceased to have any proprietary rights over the land. The arbitrator rejected the contention of the appellants that by the Deed of 1905 they did not surrender their rights over the parcels of land; that they only surrendered their Tulin rights, that is, their rights to collect toll (taxes) over persons using the Lawas and Merapok river and their tributaries.

[10] The award of the arbitrator is as follows:

ISSUES BEFORE THE COURT

From the evidence in this case, the Court is of the opinion that the determination of the NCR is also subject to the several agreements which had been made by the ascendants of the Claimants in this case.

As such, beside [...] determining whether or not the NCR exist, the Court must also take into account the effect of those agreements (referred in this ground as 'Deed 1905' and 'Deed 1955' respectively) to the right of the Claimants.

The Court is of the opinion that there is no issue on the area of the land claimed by the Claimants (which will be referred as the Claimed Land).

FINDINGS OF THE COURT

1. Creation of NCR and the Tulin's right

In the present case the Court is agreeable with the Claimants' counsel that from the evidence adduced in the aerial photography, there are evidences which significant part of the Claimed Land as a cleared area. This is an inference that there is human activity that had been conducted and most importantly, prior to 1958. This is also an inference that such activity established a continuous occupation of the said Claimed Land.

The Court is on positive acceptance [that] by the Tulin's right and the aerial photographs NCR had been established at that stage of land.

Be that as it may, the Court refers to the evidence of the objectors' witness especially the evidence of OW1. The Court by scrutinizing the evidence finds that the evidence solely refer to the right of the land is because of the existence of 'Tulin' right which concerns more on the right of the land based on legal right rather than the physical right which is based on activities conducted on the said [land] as well as continuous occupation of the Claimed Land.

The Court is on positive acceptance by the Tulin's right and the aerial photographs NCR had been established at that stage of land.

In this situation the Court is agreeable with the respondent submission which stated that:

> 5.4 The only evidence that is adduced by the Objectors is the evidence of OW1, Exhibit 020 who stated that the Objectors are the descendants of the Royal Brunei family and in particular the descendants of *Dato' Pengiran Haji Matusin* who acquired Native Customary Rights ('NCR') over the lands within the vicinity of Kampung Pemukat, Kampung Dato, and Kampung Panglung which is all within Kuala Lawas.

which even though the NCR has been established (based on the evidence of the aerial photographs), the issue for the Court to determined which has also been pointed by the respondent and agreed by the Court as to:

> Whether the Objectors who have been in receipt of Tulin payment for the land in issue [...] can still claim that they have lawfully acquired NCR over the area claimed?

In this case [it] is therefore important for the Court to determine the effect of the Deed 1905 and Deed 1955 since the Claimants in this case, being the descendants of the Tulin's receiver, the said Deeds shall also bind the Claimants.

2. Deed 1905 and Deed 1955

It is important for the Court in this case to interpret literally and objectively the purpose and reason of the Deeds entered. Based on the wording of the Deed 1905, the Court agrees with the submission of the respondent that:

> *Pengiran Haji Matusin*, Pengiran Haji Ismail and Pengiran Natasim (herein after called the 'three Pengirans') have ceded the whole of Lawas and Merapok rivers together with all their tributary streams and lands (which include Kuala Lawas) to the Rajah of Sarawak and his successors for ever and ever, and the Rajah of Sarawak on behalf of himself and his successors promises to pay six thousand dollars yearly to them and their descendants for ever and ever and to all those who have interests in this river.

Based on the wording of the Deed 1955, it is clear that:

> To make no further claim in respect of the said rights and privileges or in respect of any financial or other assistance of any nature whatsoever arising out of or in respect of the said rights and privileges;
>
> To indemnify and keep indemnified the government from and against all sum of money accounts actions proceedings claims and demands arising out of or in respect of the said rights and privileges; and
>
> Unconditionally to hand over to the government any document deed letter or thing relating in any way to the said rights and privileges which may at any time hereafter come into their possession power or control.

The Court [is] not able to accept the contention of the Claimants' submission that the Tulin's right is only the right to levy taxes and dues but not a right to the land.

The Court must interpret the meaning of the cession objectively and based on the whole context, it is clear before the Court that the cession was made unconditionally and therefore the existence of NCR could not be continuously in operation. To accept the Claimant's contention would mean that beside receiving the amount given by the government, and still having the right to the land, it is unsustainable to be accepted by the Court since such contention would mean that such ownership of the land should still belong to the Sultan of Brunei.

As such the correct interpretation before the Court in this case is that such right which includes the NCR to the land or taxes or whatsoever in existence, was extinguished by the cession to the government.

CONCLUSION

In the present case, based on the evidence adduced, it is clear cut before the Court to interpret that the claimant being the descendants are no longer in existence with the NCR right by virtue of the cession to the Government.

Therefore the Court in this case does not allow the Claimants [i]n both suits or cases in claiming for the Claimed Land and therefore no amount of compensation shall be recorded and it is not a requirement before the Court to assess the value of the Claimed land in question.

On the issue of costs, the Court reserves any order and leave to interested parties to apply and shall be determined by the Court later at the later proceedings.

NASRUL HADI BIN ABDUL GHANI

Deputy Registrar

High [Court] Miri/Limbang

Sitting as Land Arbitrator

5–8–2013

[11] The deed of 1905 referred to in the award of the arbitrator reads:

SARAWAK, 1905

CESSATION of 'tulin' rights, Lawas and Merapok.

Dated April, 1905

WHEREAS this written manifest from us Pangiran Haji Matusin and Pangiran Haji Ismail and Pangiran Natasim, who live at Lawas witnesseth that we three cede the whole of the Lawas and Merapok rivers, together with all their tributary streams and lands to the Rajah of Sarawak and his successors for ever and ever, and the Rajah of Sarawak on behalf of himself and his successors promises to pay six thousand dollars yearly to us for ever and ever and to all those who have interests in these rivers. Thus it is.

LAWAS. Written on the ... day of the month April, 1905.

THERE IS NO APPEAL AGAINST THE DECISION OF AN ARBITRAL TRIBUNAL

[12] There is a basic and important legislative policy codified in our Arbitration Act, and that policy is that the award of an arbitrator is final and binding. There is no recourse to a court of law by way of an appeal. This is clearly stated by s 36 of the Act:

An award is final and binding

36(1) An award made by an arbitral tribunal pursuant to an arbitration agreement shall be final and binding on the parties and may be relied upon by any party by way of defence, set-off or otherwise in any proceedings in any court.

(2) The arbitral tribunal shall not vary, amend, correct, review, add to or revoke an award which has been made except as specifically provided for in section 35.

EXCEPTIONS TO THE POLICY

[13] However, the Act provides for some but limited exceptions where an award of the arbitrator may be challenged in a court of law. A party to an arbitration proceedings aggrieved by an award may apply to a High Court to set aside the award under s 37 of the Act. But he may do so only in the limited circumstances as specified by that section.

[14] Another exception is that a party to an arbitral proceedings, dissatisfied with the decision of the arbitral tribunal, may refer a question of law to the High Court pursuant to s 42 of the Act for the court's determination.

REFERENCE TO THE HIGH COURT ON 'QUESTIONS OF LAW'

[15] In the present case the appellants purported to refer to the High Court eight 'questions of law' pursuant to s 42 of the Act. The eight 'questions of law' are:

(1) Pursuant to section 42 of the Arbitration Act 2005, the following questions or points of law arising out of an Award made between in Arbitration Case No. LBG/ARB/LC/1/2002 *Awangku Dewa bin Pgn Momin & 3 Ors v Superintendent of Lands and Surveys, Limbang Division* and LBG/ARB/LC/1/2003 *Awangku Dewa bin Pgn Momin & 3 Ors v Superintendent of Lands and Surveys, Limbang Division* which were jointly heard before the learned Arbitrator, Tuan Nasrul Hadi bin Abdul Ghani be determined, namely:

(a) Whether the learned Arbitrator erred in law in holding that the cession meaning of the 1905 and 1955 Deeds must be interpreted objectively and that the cession was made unconditionally and that the existence of NCR could not be continuously be in operation despite the cession was only for rights to levy taxes which is known as 'tulin' rights;

(b) Whether the learned Arbitrator erred in law in not accepting that the 'tulin' rights are only the right to levy taxes and dues but not a right to the land despite no witnesses or evidences tendered by the defendant to challenge the plaintiffs' contention that tulin rights are only rights to levy taxes and not a right to the land;

(c) Whether the learned Arbitrator erred in law and in holding that the correct interpretation is that such right which includes the NCR to the land or taxes or whatsoever in existence, was extinguished by the cession to the government despite no evidence to suggest that their NCR land has been extinguished before 1958;

(d) Whether the learned Arbitrator erred in law in holding that the Objectors/Plaintiffs are no longer in existence with the NCR right by virtue of the cession to the Government;

(e) Whether the learned Arbitrator erred in law in holding that the cession

to the Government tantamount to the extinguishment of NCR land despite legal precedent held that cessation does not in effect extinguish the pre-existing rights of NCR over land;

(f) Whether the learned Arbitrator erred in law in holding that the Plaintiffs' NCR land has been previously extinguished by the 1905 and 1955 Deeds even though the plaintiffs' NCR over the said lands were extinguished only by Land (Extinguishment of Native Customary Rights) (Kuala Lawas Area) (No. 55) Direction, 1997 ('the 1997's Direction') and Land (Native Customary Rights) (No. 22) Direction, 2000 ('the 2000's direction') which has led to the arbitration of 2002's case and 2003's case;

(g) Whether the learned Arbitrator erred in law in not finding that there could not be an extinguishment of the plaintiffs' NCR over the said Lands by way of the 1997's Direction and the 2000's Direction if there were already extinguishment before 1958; and

(h) Whether the learned Arbitrator erred in law in disallowing the plaintiffs/Objectors' claim in the arbitration.

THE DECISION OF THE HIGH COURT

[16] The High Court, having heard the reference/application, refused to set aside the award, and, instead, confirmed the same. The learned High Court judge, in his grounds of judgment, however, does not explain which of the eight 'questions of law' that he chose to answer (and why) and which of the same that he chose to discard (and why). However, he ruled:

> 14. The arbitrator ruled that at the material times Pengiran Hj Matusin, Pengiran Hj Ismail and Pengiran Hj Natasim were the owners of an area of land at Kuala Lawas, Lawas and had been collecting tulin payments from people using Lawas and Merapok rivers together with all their tributary streams and lands. The arbitrator ruled that however pursuant to two deeds made in 1905 and 1955 respectively by Pengiran Hj Matusin and the said two others had ceded the whole of Lawas and Merapok rivers together with all their tributary streams and lands to the Rajah of Sarawak and his successors for ever and ever, and the Rajah of Sarawak on behalf of himself and his successors promised to pay 6,000 dollars yearly to them and their descendants for ever and ever and to all those who have interest in this river.
>
> 15. It was clearly stated in the deeds that Pengiran Hj Matusin and the two others 'to make no further claim in respect of the said rights and privileges or in respect of any financial or other assistance of any nature whatsoever arising out of or in respect of the said rights and privileges and to indemnify and keep indemnified the government from and against all sum of money accounts actions proceedings claims and demands arising out of or in respect of the said rights and privileges.'
>
> 16. Therefore based on the two deeds the arbitrator did not agree with the contention of the plaintiffs that the cessation was only in respect of the rights to levy

taxes and dues but did not cede the rights to the land. The arbitrator ruled that the cessation was made unconditionally and the plaintiffs could not claim the land as their NCR land.

17. This is not a case of the Rajah and/or the Sarawak Government (having) extinguished the NCR over the land or (having) acquired the land for public purposes. The word 'cede' has been defined in the *Concise Oxford Dictionary* to mean 'to give up one's rights to or possession of'. Based on the deeds, Pengiran Matusin and the two others had surrendered and gave up their rights to and possession of the land to the Rajah in consideration of the payments made. Since then they were no longer in possession of the land and no longer the owners of the land. The plaintiffs could no longer claim the land as their land. These transactions were contractual in nature and since then there was no complaint or attempt by Pengiran Matusin and the two others or by their successors to challenge or to set aside the deeds or contracts.

18. I have read the Plaintiffs' application together with the numerous exhibits, the submissions of the parties and the authorities cited. I have also read the award made by the arbitrator. There was no error on the face of the award and there was no reason to intervene on the questions of law or to set aside the award. For the reasons given, the application is dismissed with costs of RM2,000.

[17] We have read and re-read the learned High Court judge's grounds of judgment in its entirety and it is our disturbing impression in the present case that the learned High Court judge, in spite of having noted that the application before him is a reference on questions of law pursuant to s 42 of the Act (see paras 1 and 7 of his grounds of judgment), and that there is no right of appeal to the High Court from the decision of the arbitrator (see para 13 of his grounds of judgment), yet from the tenor of his grounds of judgment he was treating the proceedings before him as if it is an 'appeal' against the decision of the arbitrator.

THE APPROACH TAKEN BY COUNSEL OF BOTH SIDES

[18] We have also read the written submission of learned counsel for the appellants as well as the written submission of the learned state counsel for the respondent. It is our observation that, just like the learned High Court judge, both counsel, in spite of having acknowledged that the proceedings before them is initiated pursuant to s 42 of the Act, yet appear to treat the proceedings as if it is an 'appeal' and not a reference on questions of law. There is scant regard for the purpose and integrity of s 42 of the Act that what is permissible under that provision is only to refer purely a question of law to the High Court, and nothing more.

THE HIGH COURTS HAVE NO APPELLATE JURISDICTION

[19] On our part, in considering this appeal we remind ourselves what was said in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113 by Gopal Sri Ram JCA (as he then was), in delivering the decision of the Court of Appeal (at p 124, para [14]):

> [14] It is the unanimous view of all the authorities that the High Court in exercising its statutory jurisdiction under the Arbitration Act 1952 does not enjoy appellate jurisdiction.

DECISION OF THIS COURT

[20] We are dismissing the appeal with costs. Our decision is unanimous.

[21] However, our reason for dismissing the appeal is different from the reasons of the learned High Court judge in refusing to set aside the award.

[22] In our judgment the eight 'questions of law' referred to the High Court are not genuine questions of law but rather an attempt to appeal against the decision of the arbitrator. If it had been a genuine move to refer questions of law to the High Court, then, the questions of law would have been concisely and clearly framed; and the questions posed need not have to be as many as eight. Instead, what we find in the originating summons, are not concisely and clearly framed questions of law, but rather criticisms of the decisions of the learned arbitrator drafted in the manner that one normally finds in the 'grounds' of a memorandum (or petition) of appeal (note the repeated usage of the phrase 'erred in law' in every 'question' that was posed). In other words, we find the 'reference' to be an attempt to appeal against the award (which the Act does not allow) but disguised as a 'reference on questions of law' under s 42.

[23] And to add to the problem, we note with dismay that the 'questions of law' as spelt out in the supporting affidavit are not the same as the 'questions of law' as formulated in the originating summons. This is what the supporting affidavit states on the 'questions of law' to be determined:

> 19. Having read the written ground of Decision, the Plaintiffs are advised by our Counsel and we verily believe that there are questions of law arising out of the said Decision, which we say were decided based on the wrong principle of law. Hence this application under section 42 of the Arbitration Act 2005 is made to set aside the said Decision.
>
> 20. I am advised by my Counsel and I verily believe that:-

(i) The learned Arbitrator adopted and applied the wrong principle of law as he had even though he expressly stated that 'The Court is on positive acceptance by the Tulin's right and the aerial photographs NCR had been established at that stage of land':-

(a) Failed, neglected or did not apply or give effect to the judgment of the High Court in *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 that there must be clear unambiguous words to the effect if it was intended that the native customary rights that had existed since before the time of the First Rajah and that had survived through all the orders and legislation were to be extinguished; and

(b) Failed, neglected or did not apply or give effect to the judgment of the Federal Court in *Superintendent of Lands & Surveys Miri Division v Madeli Salleh* [2007] 6 CLJ 509 that the Crown's right or interest is subject to any native rights over such land and that the usufructuary title was not affected by the cession;

(ii) failed to appreciate the fact that the testimony of the 'tulin' rights by OW1, was never challenged by the defendant; and

(iii) failed to appreciate that the Plaintiffs' NCR over the said Lands were only now extinguished by the Land (Extinguishment of Native Customary Rights) (Kuala Lawas Area) (No. 55) Direction, 1997 ('the 1997's Direction') and Land (Native Customary Rights) (No. 22) Direction, 2000 ('the 2000's direction') which has led to the arbitration of 2002's case and 2003's case and not through the Deed of Release in 1955 which is shown in Exhibit AD-15 annexed herein.

[24] Thus there is an element of inconsistency and confusion here. The supporting affidavit should have adopted the same 'questions of law' as set-out in the originating summons, and should have proceeded to explain the relevance and significance of each of the 'questions' (in the event the 'questions' are answered in favour of the appellants); and the supporting affidavit should seek to explain why the questions must be answered in favour of the applicants/appellants.

[25] Further, the supporting affidavit should set-out the complete facts of the case, facts that are necessary or relevant for the purpose of the questions posed. There should not be any suggestion in the affidavits of parties (but the affidavits, however, do suggest) of facts being disputed or of any disagreement on the part of the applicants/appellants with the evaluation of the evidence by the arbitrator.

[26] Apart from the 'questions of law' posed in the supporting affidavit not being the same, we also observe that in the supporting affidavit, the 'questions of law' (which, now, numbers much less than eight), just like the 'questions of

law' in the originating summons, are not concisely and clearly drafted; and, likewise, they are drafted in such a manner as if they are 'grounds' in a memorandum (or petition) of appeal.

GUIDANCE FOR THE HIGH COURTS

[27] We wish to take the opportunity here to provide the following guidance for the benefit of the High Court judges in dealing with a s 42 reference. A High Court in considering a s 42 reference must not take lightly the duty to critically examine the questions posed by the applicant and to ensure that the question referred to the court is purely a question of law and not a question of mixed law and fact, and is clearly and concisely framed, before embarking to entertain the application and to answer the question posed. There should be no complication, confusion or duplicity in framing the questions. Instead, there should be simplicity and clarity. The legal burden is on the applicant to ensure that these requirements are strictly complied with.

[28] A High Court in dealing with a s 42 reference must summarily dismiss the application, without even attempting to answer the 'question of law' posed to the court, if the question is, in the first place, not properly and intelligibly framed; or where it is clear to the court that there is a disguised attempt by the applicant to appeal against the decision of the arbitral tribunal. In other words, a court of law must always be vigilant against any attempt by a party to abuse the s 42 procedure as provided for by the Act and to utilise the provision as a backdoor avenue for appealing against the decision of an arbitral tribunal.

[29] Perhaps, to put what we have just said in another way, the High Court must ensure that the question posed by the applicant to the court is a proper and valid question. As the Court of Appeal said in *SDA Architects (sued as a firm) v Metro Millennium Sdn Bhd* [2014] 2 MLJ 627; [2014] 3 CLJ 632 (at p 633 (MLJ); at p 639 (CLJ), paras [9]–[12]):

> [9] In my judgment, for a proper invocation of s 42(1) of the Arbitration Act 2005, the question referred to the High Court must be a proper and valid question.
>
> [10] For the purpose of this judgment, I need only to focus on the first proposed question, since the second proposed question is consequential in nature.
>
> [11] In my view, in the present case, this particular 'question of law' referred to the High Court purportedly pursuant to s 42 is not a proper and valid question of law.
>
> [12] But how does one determine whether a particular question raised is a proper and valid question of law or not? In my judgment, one does so by considering the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator.

[30] Appeal dismissed with costs of RM10,000 to the respondent.

Appeal dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor